Supreme Court, U. S.
FILED
AUG 16 1976
MICHAEL RODAK, JR., CLE

IN THE SUPREME COURT OF

THE UNITED STATES

~~76-2301~~ .

UNITED STATES OF AMERICA,

Petitioner,

- against -

HOWARD P. GISKIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

Howard P. Giskin, petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on May 25, 1976.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 25, 1976. Petition for rehearing en banc was denied on July 23, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

I. Whether the contraband seized, pursuant to a search warrant, should be suppressed

where the affiant merely states that another agent obtained the information from an informant who had "demonstrated a pattern of reliability"; the informant is paid on a contingent fee basis, (contingent upon conviction) and the contingent fee arrangment is not made known to the Magistrate issuing the search warrant.

II. Whether this affidavit has sufficient factual basis to establish probable cause for the issuance of a search warrant.

CONSTITUTIONAL PROVISIONS INVOKED

1. The Fourth Amendment, United States Constitution.

STATEMENT

On August 29, 1975, a search warrant was issued out of the United States District Court for the Northern District of New York. Pursuant to the search warrant, the residence of the petitioner was searched and ten (10) ounces of a controlled substances were seized.

The search warrant was issued upon the affidavit of a Special Agent of the Drug Enforce-

ment Administration. The affiant stated that he believed that the contraband was concealed on the premises in question. The grounds for such information and belief were set forth in the following language:

> "From on or about the 7th day of May and continuously up to and including the date of the filing of this affidavit, in the Northern District of New York, Howard GISKIN et al and others unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate 21 USC 846; It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would manufacture illegally and possess with intent to distribute Schedule 1 controlled substance the exact amount thereof being unknown in violation of 21 USC 841 (a)1. In pursuance of the said conspiracy and to effect the objects thereof, on or about the 7th day of May 1975 in the Northern District of New York, a Howard Cooper representing Educational Research, P.O. Box 721, Saranac Lake, N.Y. placed an order of phenyl-2-propanone along with the laboratory equipment. That the contact telephone number for Howard Cooper is listed to Howard GISKIN, Herron Hill Road, Cannemora, N.Y. It is believed that P.O. Box 721, Saranac Lake, N.Y. and Literary Aids, Inc., Richmond, Vermont are subterfuge addresses used to order precursors to manufacture methamphetamine. That on July 28, 1975, at approximately 4 P.M. a informant who

> has demonstrated a pattern of reliability in the past was greeted at the front door of the GISKIN residence by an unknown male who had white flakes of an unknown substance scattered on his hair and beard. That the informant smelled a strong chemical odor which he described as a "putrified odor". On the evening of August 28, 1975, SA Benny T. Mangor learned from DEA Chemist Jack Fasanello that a putrified odor is indicative of amine free bases such as amphetamine or methamphetamine."

At the suppression hearing in the District Court, the following facts were brought out:

1) The informer did not communicate directly to the affiant, rather he communicated to another agent of the Drug Enforcement Administration and the agent then gave the information to the affiant;

2) The informant was a paid informant, payment being contingent upon conviction;

3) There was no evidence to show that the Magistrate was informed of the contingent fee arrangement at the time he issued the warrant, in fact, the evidence indicates that he was not so informed.

The District Court denied the motion to

suppress. Petitioner then pleaded guilty under the procedure outlined in U.S. v. Burks, 517 F2d 377 (Second Circuit, 1975) pending his appeal to the United States Court of Appeals, Second Circuit. The Court of Appeals held that the seized contraband should not be suppressed. A petition for a rehearing en banc was denied on July 23, 1976.

REASONS FOR GRANTING THE WRIT

In Spinelli v. United States, 393 U.S. 410 and Aguilar v. Texas, 378 U.S. 108, this Court held that an affidavit reciting information from an informant is insufficient to provide the basis for issuing a search warrant unless the affidavit (1) sets forth the underlying circumstances with sufficient specificity to enable the Magistrate to make an independent judgment concerning the validity of the informant's conclusion concerning the crime and (2) presents information to show that the informant is credible.

United States v. Harris, 403 U.S. 573 held an affidavit based on information given the

affiant by an informant who had actually purchased illicit whiskey from the defendant, when coupled with the affiant's own knowledge of the defendant's background, provided a sufficient basis for the issuance of a search warrant.

In this case, much of what the affiant states is based on mere belief or suspicion. The informant does not report any crime, merely some "white flakes" and a "putrified odor".

It is felt that such is not a sufficient factual basis for the issuance of a search warrant. The facts listed, even if true, do not establish probable cause. At best there is only evidence that might allow one to speculate that a crime is taking place.

We ask the Court to grant review in this case because it presents the important questions whether the contingent fee arrangement so diminished the credibility of the informant that the probable cause was not established and whether this Court will approve the actions of a federal

police force in withholding the fact of a contingent fee arrangement from the issuing magistrate.

Certainly, the fact that the informant was paid a fee contingent upon conviction bears heavily on his reliability. It is obvious that an informer in such a case might supply "information" based on mere gossip or speculation, yet allege that such was based on his own personal knowledge, perhaps even creating a story to show the supposed context in which he obtained the information.

In this case, the major basis for the search warrant was the information provided by the paid informant. There was not the bulk of information personally known to the affiant as was present in United States v. Harris, 403 U.S. 573. In such a case, the reliability and credibility of the informant is of extreme importance.

Although it is possible that probable cause might have been established had there been no contingent fee arrangement, it is submitted that

the officers of the federal police organization had an obligation to inform the magistrate of any facts which reasonably reflect on the informat's credibility.

The issue of probable cause should be determined by looking at the entire picture, not merely a one-sided and slanted viewpoint. It is patently obvious that probable cause can apparently be established, where none in fact exists, by giving the magistrate only a portion of the facts and withholding information which would be adverse to the issuance of the warrant.

The issue presented in this case is important, not only to the petitioner but to all those persons suspected by the police of possessing contraband. Law enforcement officers should be obligated to advise a magistrate of all reasonably pertinent facts bearing on the issuance of a search warrant, not merely a partial and lopsided version of the information.

It would seem that the only way to induce the police authorities to supply the information

to the magistrate is to suppress any evidence seized under a search warrant where the police have failed to act in good faith by withholding pertinent facts from the magistrate.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

J. BYRON O'CONNELL
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66 Margaret Street
Plattsburgh, New York 12901
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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Twenty-fifth day of May, one thousand nine hundred and seventy-six.

PRESENT:

HON. J. JOSEPH SMITH

HON. PAUL R. HAYS

HON. THOMAS J. MESKILL,

Circuit Judges,

UNITED STATES OF AMERICA, Appellee,	:	
V.	:	Docket No. 76-1073
HOWARD GISKIN, Appellant.	:	

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

The affidavit in support of the search warrant contained factual allegations sufficient to support the magistrate's conclusion that there was probable cause to believe that the manufacturing of controlled drugs was occurring illegally at the Giskin residence. The reliability of the prosecution's confidential informant was sufficiently established in the affidavit. Finally, the search warrant sufficiently described the premises to be searched.

Appellant's argument that the district court erred in denying motions in connection with a bill of particulars was waived by his plea of guilty. The length of the sentence imposed upon the appellant, being within the statute's permissible limits, is not subject to review.

/s/ J. Joseph Smith
J. JOSEPH SMITH

/s/ Paul R. Hays
PAUL R. HAYS

/s/ Thomas J. Meskill
THOMAS J. MESKILL

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 23rd day of July, one thousand nine hundred and seventy-six.

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United States of America,

Plaintiff-Appellee,

v. 76-1073

Howard P. Giskin,

Defendant-Appellant.

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A petition for rehearing containing a suggestion that the action be reheared in banc having been filed herein by counsel for the appellant, Howard P. Giskin, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ Irving R. Kaufman
IRVING R. KAUFMAN
Chief Judge

ORDER OF THE UNITED STATES

DISTRICT COURT

No written decision was handed down by the United States District Court. The Motion to Suppress was denied orally from the bench.

CONSITUTIONAL PROVISIONS INVOLVED

THE FOURTH AMENDMENT,

UNITED STATES CONSTITUTION:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Supreme Court, U.S.
FILED
NOV 4 1976
MICHAEL RODAK, JR., CLERK

No. 76-230

In the Supreme Court of the United States

OCTOBER TERM, 1976

HOWARD P. GISKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-230

HOWARD P. GISKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that an affidavit in support of an application for the issuance of a search warrant contained insufficient facts to establish probable cause.

Following a suppression hearing in the United States District Court for the Northern District of New York, the court denied petitioner's motion to suppress as evidence laboratory equipment and a quantity of methamphetamine, a Schedule II controlled substance, seized pursuant to a search warrant from his home. Petitioner thereafter pleaded guilty to one count of manufacturing and possessing with intent to distribute a controlled substance, in violation of 21 U.S.C. 841(a), reserving, with the government's consent, his right to appeal the denial of

his suppression motion.[1] Petitioner was sentenced to a term of three years' imprisonment, all but six months of which was suspended in favor of probation. The court of appeals affirmed (Pet. App. A).

In his suppression motion, petitioner challenged the sufficiency of the affidavit that Special Agent Mangor of the Drug Enforcement Administration (D.E.A.) submitted in support of the application for a warrant to search petitioner's house for an illicit laboratory for manufacturing methamphetamine. The affidavit recited the following facts (Pet. 3-4; Appellant's Brief and Appendix below at 21-22): That on May 7, 1975, a Howard Cooper, who alleged that he represented Educational Research, Post Office Box 721, Saranac Lake, New York, placed an order for phenyl-2-propanone and laboratory equipment; that the contact telephone number given by Cooper when placing his order was listed to petitioner's residence (the place for which the warrant was sought); that on July 28, 1975,[2] an informant, who was described as a person who "has demonstrated a pattern of reliability in the past," was greeted at the front door of petitioner's residence by an unknown male "who had white flakes of an unknown substance scattered on his hair and beard," and that the informant smelled a strong chemical odor which he described as a "putrified odor"; that the address given by Cooper was believed to be a subterfuge address used to order precursors to the manufacture of methamphetamine; and that the affiant then learned from a D.E.A.

[1]This was done in accordance with the procedures outlined by the Second Circuit in *United States* v. *Burke*, 517 F. 2d 377.

[2]The affidavit inadvertently stated that this event took place on July 28, 1975. The affiant testified at the suppression hearing, however, that he told the magistrate under oath prior to the issuance of the warrant that the date was August 28, 1975—only a few hours prior to the issuance of the warrant (Suppression Tr. 65-67).

chemist that "a putrified odor is indicative of amine free bases such as amphetamine or methamphetamine." The warrant was issued and executed the next day, and methamphetamine and paraphernalia for an illicit laboratory were seized.

Based upon a common-sense reading of the entire affidavit, *Spinelli* v. *United States*, 393 U.S. 410, 415; *United States* v. *Ventresca*, 380 U.S. 102, 108, the information presented was sufficient to establish probable cause to believe that evidence of a crime would be found in petitioner's home. The order for laboratory equipment and phenyl-2-propanone was made by a man allegedly representing Educational Research, who gave the telephone number of petitioner's residence instead of a business telephone. As phenyl-2-propanone was the only chemical ordered, the magistrate could conclude that phenyl-2-propanone was destined for use as a precursor to the manufacture of methamphetamine.[3] This information, combined with the personal observations of the informant that he smelled a putrified odor and saw white flakes in a man's hair and the statement of the chemist that the odor reported indicated the manufacture of methamphetamine, supported the magistrate's finding that the phenyl-2-propanone and laboratory equipment ordered had probably reached petitioner's premises and was being used there for the manufacture of methamphetamine.[4]

[3]The presence of precursors may be used in determining probable cause. *United States* v. *Noreikis*, 481 F. 2d 1177, 1178 (C.A. 7), vacated in part on other grounds, 415 U.S. 904; *United States* v. *Moore*, 452 F. 2d 569, 572 (C.A. 6), certiorari denied, 407 U.S. 910.

[4]Contrary to petitioner's assertion (Pet. 6), the information provided by the informant was not based "on mere belief or suspicion" but on his observations based on sight and smell, and it thus satisfied the two prongs of the test in *Aguilar* v. *Texas*, 378 U.S. 108.

Nor was the reliability of the informant undermined because the affidavit did not specify that the informant's pay was conditioned on ultimate conviction.[5] The informant was described as a person who "has demonstrated a pattern of reliability in the past," see, *e.g.*, the affidavit sustained in *Rugendorf* v. *United States*, 376 U.S. 528, 530, and the reliability of his information about petitioner's residence was supported by information that the telephone used to order the precursor was listed at petitioner's residence. In view of the corroborating information furnished to the magistrate, the contingent fee arrangement could have had no significant bearing on the informant's reliability or the sufficiency of all of the information in the affidavit to establish probable cause.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1976.

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[5]Paying an informant for the value of his services is not impermissible *per se*. See *United States* v. *Jett*, 491 F. 2d 1078, 1081 (C.A. 1); *Heard* v. *United States*, 414 F. 2d 884, 886 (C.A. 5); cf. *United States* v. *Crim*, 340 F. 2d 989, 990 (C.A. 4).